BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULES I through XVII and the repeal of ARM Title 17, chapter 8, subchapter 7 pertaining to the issuance of Montana air quality permits	NOTICE OF ADOPTION AND REPEAL (AIR QUALITY)

TO: All Concerned Persons

1. On February 14, 2002, the Department of Environmental Quality published a notice of proposed adoption and repeal of rules pertaining to the issuance of Montana air quality permits at page 276, 2002 Montana Administrative Register, issue number 3.

2. The Board decided not to repeal the entire subchapter 7, as originally noticed, and the new rules are being placed within that subchapter. The Board adopted new rules II (17.8.743), III (17.8.744), IV (17.8.745), V (17.8.748), IX (17.8.756), XI (17.8.760), XIII (17.8.763), XIV (17.8.764), XVI (17.8.767) and XVII (17.8.770), and repealed ARM 17.8.701, 17.8.702, 17.8.704, 17.8.705 through 17.8.707, 17.8.710, 17.8.715 through 17.8.717, 17.8.720 and 17.8.730 through 17.8.734 exactly as proposed. The Board adopted new rules I (17.8.740), VI (17.8.749), VII (17.8.752), VIII (17.8.755), X (17.8.759), XII (17.8.762) and XV (17.8.765), as proposed, but with the following changes, stricken matter interlined, new matter underlined:

RULE I (17.8.740) DEFINITIONS For the purposes of this subchapter:

(1) through (3) remain the same as proposed.

(4) "Emitting unit" means:

(a) any equipment that emits or has the potential to emit any regulated air pollutant under the Clean Air Act of Montana through a stack(s) or vent(s); or

(b) any equipment from which emissions consist solely of fugitive emissions of a regulated air pollutant under the Clean Air Act of Montana.

(5) through (15)(b) remain the same as proposed.

RULE VI (17.8.749) CONDITIONS FOR ISSUANCE OR DENIAL OF PERMIT (1) When the department issues a Montana air quality permit, the permit must authorize the construction and operation of the facility or emitting unit subject to the

conditions in the permit and to the requirements of this subchapter. The permit must contain any conditions necessary to assure compliance with the Federal Clean Air Act, the Clean Air Act of Montana and rules adopted under ~~that Act~~ those acts.

(2) and (3) remain the same as proposed.

(4) The department shall issue a Montana air quality permit for the following unless the department demonstrates that the emitting unit ~~does not operate or~~ is not expected to operate in compliance with applicable rules, standards, or other requirements:

(a) through (8)(c) remain the same as proposed.

RULE VII (17.8.752) EMISSION CONTROL REQUIREMENTS

(1) The owner or operator of a new or modified facility or emitting unit for which a Montana air quality permit is required by this subchapter shall install on the new or modified facility or emitting unit the maximum air pollution control capability that is technically practicable and economically feasible, except that:

(a) and (i) remain the same as proposed.

(b) The lowest achievable emission rate must be met to the extent required by ARM Title 17, chapter 8, subchapters 9 and 10, for those emitting units subject to ~~that subchapter~~ those subchapters.

(2) remains the same as proposed.

RULE VIII (17.8.755) INSPECTION OF PERMIT (1) Current Montana air quality permits must be made available for department inspection at the location of the facility or emitting unit for which the permit has been issued, unless the permittee and the department mutually agree on a different location.

RULE X (17.8.759) REVIEW OF PERMIT APPLICATIONS

(1) through (3) remain the same as proposed.

(4) After making a preliminary determination, the department shall notify those members of the public who requested such notification subsequent to the notice required by ARM 17.8.748(7) and the applicant of the department's preliminary determination. The notice must specify that comments may be submitted on the information submitted by the applicant and on the department's preliminary determination. The notice must also specify the following:

(a) that a complete copy of the application and the department's analysis of the application is available from the

department and in the air quality control region where the emitting unit is located;

(b) through (5) remain the same as proposed.

RULE XII (17.8.762) DURATION OF PERMIT (1) A Montana air quality permit is in effect until the permit is revoked under ARM 17.8.763, amended under ARM 17.8.764, or modified under ARM 17.8.748. Portions of ~~an~~ a Montana air quality permit may be revoked, amended, or modified without invalidating the remainder of the permit.

(2) remains the same as proposed.

RULE XV (17.8.765) TRANSFER OF PERMIT (1) A Montana air quality permit may be transferred from one location to another if:

(a) through (b) remain the same as proposed.

(c) the permitted facility can be expected to operate in compliance with:

(i) the Federal Clean Air Act, the Clean Air Act of Montana and rules adopted under ~~that Act~~ those Acts, including the ambient air quality standards; and

(ii) remains the same as proposed.

(d) the owner or operator of the permitted facility complies with ARM Title 17, chapter 8, subchapters 8, 9 and 10, as applicable.

(2) and (3) remain the same as proposed.

3. The following comments were received and appear with the Board's responses:

Comment No. 1: The representative of an environmental organization commented that, in New Rule XIV, "administrative error" should be explicitly defined to avoid the potential abuse of this rule, designed to allow only insignificant changes to avoid air quality impact review. The commentor also stated that, perhaps, the word "amend" also should be defined.

Response: The board believes that the meaning of the terms "administrative error" and "amend," as used in the context of this proposed rule, concerning administrative amendments, is clear and that definitions of those terms are not necessary.

Comment No. 2: An attorney representing several regulated facilities, and an additional representative of one of those facilities, both submitted Comment Numbers 2 through 4. They commented that the preamble, which represents the

history and intent of the subcommittee that developed the proposed new rules, should be included in the proposed rules, or at least be included in the Montana Administrative Register with the verbatim language drafted by the subcommittee.

Response: The board does not find it necessary or appropriate to include a preamble in the proposed rules, but agrees that the following language describes the board's general intent in adopting the proposed air quality permitting rules:

"This program shall be administered so as to protect public health and the environment by: clearly identifying regulated air pollution sources and activities, providing a predictable process whereby air pollution sources can commence construction and operation, and assuring all applicable state and federal air quality regulations are met.

This program shall be administered so as to provide efficient allocation of resources for the benefit of all parties.

This statement of intent does not modify the substantive requirements of the proposed rules in any way."

Comment No. 3: The two representatives of regulated facilities commented that the subcommittee's consensus provision to allow certain seasonal construction activities after a complete application has been submitted, but before a permit is issued, should be included in the proposed New Rule II.

Response: This provision was considered by the subcommittee because department staff were aware that facilities in states in other U.S. Environmental Protection Agency (EPA) regions have been allowed to engage in certain construction activities prior to receiving an air quality permit. However, EPA Region 8 has not allowed this. The board recognizes that this provision may not be approvable by the EPA, because it would cause non-compliance with various federal statutes and regulations. The Federal Clean Air Act requires a major emitting facility to obtain a permit prior to commencing construction. Federal Clean Air Act, Section 165, "Preconstruction requirements," provides in part that "No major emitting facility . . . . may be constructed in any area to which this part applies unless -- (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part . . . ." Montana's permitting rules apply to both major and minor sources. 40 CFR 51.160 requires preconstruction permits for new sources or modifications, and 40 CFR 51.165(a)(1)(xvi)(A) specifies that

preconstruction approvals or permits must be obtained prior to actual on-site construction. Federal Prevention of Significant Deterioration of Air Quality (PSD) permitting requirements allow states to provide certain exemptions from some PSD requirements, but not from the requirement to obtain a permit in advance of construction (40 CFR 51.166).

The board recognizes that the construction season in Montana is relatively short and that facilities must pour concrete and undertake other construction while weather allows. However, the board does not believe it is appropriate to consider a rule change that could endanger program delegation or place a facility in jeopardy of violating federal requirements while complying with state rules, resulting in possible enforcement action by EPA. The board believes it is better to wait until this question is answered on a national basis as part of the ongoing EPA review of the Federal New Source Review regulations.

Comment No. 4: The two representatives of regulated facilities commented that language referencing past compliance in the issuance of an air quality permit should be deleted from New Rule VI, because permitting and compliance functions are separate. This issue was not considered by the subcommittee but arose from an issue in a contested case.

Response: This is a clarification of the current permitting rules. The board has deleted any reference to past compliance in New Rule VI(4), concerning the conditions for issuance or denial of a permit, as shown above.

EPA submitted all of the following comments (all comments below are substantially verbatim written comments).

Comment No. 5: New Rule I(14) - definition of "Routine maintenance, repair, or replacement": EPA does not have a definition for "routine maintenance, repair, or replacement" in our regulations. Rather, we see the determination of such an activity as a case specific process and one that cannot be generally defined. Based on our past determinations, routine activity has a narrow scope and should generally be applied only to actions that are regular, customary, repetitious, and undertaken as standard practice to maintain a facility in its present condition. The determination of whether a proposed modification is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency and cost of the work, as well as any other relevant factors. See Memo from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to David A. Kee,

Director, Air and Radiation Division, Region V, September 9, 1988, enclosed. We believe that the State's proposed definition for "routine maintenance, repair, or replacement" does not assure that all appropriate factors are considered in determining whether or not a proposed project is considered to be routine maintenance, repair or replacement and, subsequently, is exempt from permitting requirements for modifications. For these reasons, we believe we cannot approve this definition as a SIP revision. We believe the State should remove the definition and rely on case-by-case determinations.

Response: The board believes it is appropriate to define "routine maintenance, repair, or replacement." The board does not believe that this contradicts any of EPA's previous determinations. It will still be necessary for the department and facilities to make case-by-case determinations on this issue. Therefore, the board believes it is necessary to help facilities identify what constitutes "routine maintenance, repair, or replacement."

Comment No. 6: New Rule IV replaces earlier De Minimis Rule provisions the State adopted and submitted to EPA. We have not acted on the earlier De Minimis Rules provision. On February 12, 1999 we sent a letter to Don Vidrine and on April 1 and May 13, 1999 we sent letters to the Montana Board of Environmental Review expressing concerns with the De Minimis Rule. New Rule IV has not been revised to address our earlier concerns. Our earlier concerns still stand. We cannot guarantee that we will be able to approve the New Rule IV. Copies of the three referenced letters are enclosed. Other provisions of the New Rule refer to New Rule IV. For the same reasons mentioned above, we cannot guarantee we will be able to approve portions of other provisions that reference New Rule IV. See New Rules (I)(8) (i.e., reference to New Rule IV in definition of modify), (IX)(8) (i.e., reference to "except as specifically provided in this subchapter"), and XIV(1)(b) (i.e., provisions that allow administrative amendments for changes in operation that result in emission increases and that meet the criteria of New Rule IV(1)(a)).

Response: In its 1999 de minimis rulemaking, the board submitted a response to EPA's concerns, which may be summarized as follows: "The de minimis rule would not allow violations of major source permitting requirements. The rule contains a provision, ARM 17.8.705(1)(r)(i)(B), that specifies that any construction or changed conditions of operation at a facility that would constitute a modification of a major stationary source is not considered a de minimis action." The

department is awaiting EPA's final action on the previously submitted de minimis rule, which is not being changed in the proposed rulemaking.

Comment No. 7: New Rule VI(5) is a new provision which allows the State to specify "state-only" conditions in a Montana Air Quality Permit which would not be considered federally enforceable conditions. While it may be acceptable to include "state-only" provisions in Title V permits, all terms and conditions set forth in permits issued under a SIP-approved permit program (e.g., permits issued under subchapter 7) are federally enforceable. If the State is proposing to change its SIP-approved permit program to allow for inclusion of permit terms that are non-federally enforceable (including terms in minor NSR, major nonattainment NSR, PSD, and federally enforceable state operating permits (FESOPs) issued pursuant to SIP-approved operating permit programs), a justification as to why certain provisions do not warrant federal (and citizen) review and enforceability would need to be submitted with the rule revision. We question what types of provisions in these particular permits the State would consider as not federally enforceable. Without more details on how this particular program change would be implemented so as to ensure continued compliance with all provisions in the SIP, we have potential backsliding concerns (section 110(1) of the Act) with this provision and we believe we cannot approve such a change.

Response: The board has adopted certain requirements for which there are no comparable federal regulations or guidelines. They are designed to protect Montana's environment by addressing the state’s unique needs. These rules are not intended to be part of the State Implementation Plan (SIP) and intentionally have not been submitted to EPA for inclusion in the SIP. The board does not believe that unique state standards will compromise the integrity of the SIP, or that "backsliding" will occur. The board does not believe it is necessary to adopt a separate permitting program for these conditions, but believes it is appropriate to place them in air quality permits issued by the department.

Comment No. 8: New Rule III(1)(f) - general exclusion for emergency equipment installed in industrial or commercial facilities. We believe we cannot approve a provision that provides an exclusion for emergency equipment at such facilities. A source would need to get a permit for any such equipment. Under extenuating circumstances, enforcement discretion may be employed by the State/EPA/public if

justified but, in general, the facility should have preplanned emergency backup and that equipment should have an appropriate permit.

Response: The board considers the exclusion for emergency equipment to be further clarification of the existing rule, which has been approved by the EPA. The board believes that emissions from emergency equipment would have no adverse effect on the environment. In addition, this exclusion applies only when it is necessary to use emergency equipment to alleviate threats to public health or facility safety.

Comment No. 9: New Rule III(1)(i) - We question how the State will assure that a de minimis level of 100 tons per year for drilling rig stationary engines and turbines will not cause or contribute to violations of the NAAQS per 40 CFR 51.160(a)(2). We also question how this exemption will assure compliance with any applicable MACT requirements. If the source is a new major source, then the case-by-case MACT (required by CAA 112(g)) would apply. Also, the source may be subject to the (upcoming) MACT requirements for combustion turbines or the (upcoming) requirements for reciprocal internal combustion engines. Because of these concerns, we believe we cannot approve this rule.

Response: This provision is found in the existing rule. The proposed rule makes the provision even more stringent than the existing rule, which has been approved by EPA. This exemption would not affect maximum achievable control technology (MACT) requirements applicable to these sources.

Comment No. 10: New Rule X(4)(a) - EPA rules require that opportunity for public comment shall include, as a minimum, "availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality." (40 CFR 51.161(b)(1)). We believe we cannot approve this provision unless New Rule X(4)(a) also requires that a copy of the application and the Department's analysis of the application be made available for public inspection in the air quality control region where the source or stack is located, as is currently required in ARM 17.8.720(2)(c)(i).

Response: This is the current practice of the department, and the board has added language to New Rule X(4)(a) as shown above.

Comment No. 11: New Rules VI(2) and XII(2) - these provisions allow for a five-year extension of a specified effective date in a permit or a three-year upper limit on the expiration date of a permit, respectively. The upper limits in both cases are too long and the provisions in VI(2) and XII(2) appear to conflict with each other. We believe the State should require that the source update its BACT determination, air quality analysis and any netting analysis before extensions are granted and construction begins. The Federal PSD requirements in 40 CFR 52.21(r)(2) specify that a PSD permit will expire after 18 months. We believe we cannot approve this provision unless the rule requires an updated BACT determination, air quality analysis and netting analysis after 18 months and before the permit expires or the extension is granted. See EPA's phased construction requirements in 40 CFR 51.166(j)(4).

Response: The board does not believe there is a conflict, as these are two separate provisions. The department requires an updated best available control technology (BACT) analysis and any other analysis that is appropriate before a permit is extended. The requirement in New Rule XII(2) that construction commence no later than three years after permit issuance is sufficient to implement Montana's BACT requirement for minor sources. Existing ARM 17.8.819 contains requirements applicable to BACT determination in PSD permits that are sufficient to meet the requirements of 40 CFR 52.21(r)(2) and 51.166(j)(4). The proposed rule requirements have been made more stringent by adding the three-year time limit. This will not replace PSD requirements for PSD sources (i.e., an 18- month limit applies to PSD sources but not to non-PSD sources).

Comment No. 12: New Rule XIII allows the state to "revoke a permit or any portion of a permit upon written request of the permittee, or for violation of any requirement . . . ." We question how the Department will evaluate a request from a permittee to revoke part of a permit. For example, can a permittee request revocation of certain monitoring or recordkeeping requirements that are used for compliance demonstration? Without some more definite criteria for what type of partial revocations would be acceptable so as to ensure that all applicable requirements are met, we cannot guarantee that we would approve such a provision. Additionally, we believe that these partial revocations would not be minor administrative changes and would need to go through public review as well.

Response: The board believes it is appropriate to revoke portions of permits that are no longer applicable due to changing conditions at the facility. While some portion of the permit may be revoked, the permit as a whole still must meet any underlying applicable rules. In addition, if a partial revocation is not an administrative amendment to the permit, the department would not proceed in this manner. In this instance, the department would follow the permit requirements applicable to new or modified sources.

Comment No. 13: New Rule XV(3) adds a new provision that allows a permit transfer to be deemed approved if the department does not approve, conditionally approve or deny a permit transfer within 30 days of receipt of a notice of intent. Forty CFR 51.160(b) requires the State to make an affirmative decision on whether or not to issue a permit (or in this case on whether or not to approve a permit transfer). We believe the new provisions added in New Rule XV(3) are not consistent with 40 CFR 51.160(b) and we believe we cannot approve them.

Response: Transfers of permits from owner to owner do not impact any substantive requirements and are therefore merely ministerial actions. Permits for portable sources are written in such a manner as to comply with applicable requirements, regardless of location of the source. Since no substantive requirements are involved, the board believes that approval is not necessary in the case of a permit transfer. 40 CFR 51.160(b) applies to decisions on applications, but no application is necessary for a permit transfer. Therefore, the decision on whether or not to issue a permit has already been made.

Comment No. 14: In several provisions of the new rules appear to be a relaxation of the existing rules in the SIP. We believe we cannot approve such revisions unless the State can demonstrate that such revisions are not inconsistent with section 110(1) of the Act. Specifically:

Comment No. 14(a): Several places the new rules indicate that something "may" be done or required whereas the existing rules indicate "shall." We believe replacing "shall" with "may" is a relaxation of the existing rules. See New Rules I(1), IX(3), XII(2).

Response: The use of "may" and "shall" in the proposed rules conforms to Montana's current rule and bill drafting style and is not intended to relax the existing rules.

Comment No. 14(b): New Rule II(1)(b) requires a permit for "asphalt concrete plants, mineral crushers and mineral screens that have the potential to emit more than 15 tons per year of any airborne pollutant, other than lead, that is regulated under this chapter." The existing ARM 17.8.705(1)(o) requires a permit for these same sources with a potential to emit more than five tons per year. We believe replacing a rule that requires sources emitting more than five tons per year to obtain a permit with a rule that requires permitting for sources emitting more than 15 tons per year is a relaxation of the existing SIP.

Response: The language change in the proposed rule is intended to meet the de minimus threshold and is more stringent than federal requirements. The board believes that an air quality permit still will be required for most, if not all, asphalt concrete plants, mineral crushers and mineral screens. Therefore, the number of facilities required to obtain permits will not be less. In addition, this rule is more stringent than the previous EPA-approved rule because the permitting threshold for mineral screening operations has been lowered from 25 tons per year to 15 tons per year.

Comment No. 14(c): New Rule II(1)(d) indicates that a facility installed before November 23, 1968, and that modifies after that date does not need to receive an air quality permit if the modification does not increase the potential emissions by more than 25 tons per year of any regulated air pollutant. We find this rule confusing because New Rule IV only excuses modifications from permitting if the potential emission increases are less than 15 tons per year (although, as noted below, we previously identified concerns with New Rule IV). Additionally, we do not find that the existing permitting rules contain provisions similar to New Rule II(1)(d). Therefore, we believe New Rule II(1)(d) is a relaxation of the existing SIP.

Response: New Rule II(1)(d) and New Rule IV are different, because New Rule IV applies to those facilities that already have a permit, while New Rule II(1)(d) identifies when a permit is required. Therefore, the two rules are not inconsistent. New Rule II(1)(d) is more stringent than existing SIP-approved rules, because the current grandfather date could be interpreted to be March 16, 1979, while the actual grandfather date is November 23, 1968. When the air quality rules were recodified in 1996 after the department was formed, this approved grandfathered date was inadvertently removed from the rules during the department's effort to reduce the volume of administrative rules. The board believes

it is necessary and appropriate to place back in the rules the correct grandfather date that is consistent with the historical permitting practices of the department.

Comment No. 14(d): New Rule III(1)(g) - general exclusion for activities or equipment associated with the construction, maintenance, or use of roads except emitting units for which a permit is required under New Rule II(1)(b) or (c). This provision is similar to the existing rule at ARM 17.8.705(1)(i). However, it appears that New Rule III(1)(g) is a relaxation of what is required in ARM 17.8.705(1)(i).

Response: The board does not find this proposed rule to be less stringent than the existing rule. Those facilities that are not specifically listed as being excluded from the permit requirement in the current rule are required to obtain permits under New Rule II(1)(b).

Comment No. 15: New Rule X - We have had, and continue to have, a concern that the permitting rule only provides for a 15 day public review of preliminary determinations on permits. We believe this timeframe is too short for the public and EPA to provide comments. Because the 15-day public review timeframe starts when the preliminary determination on a permit is mailed, and it usually takes a week for us to receive the proposed permit, we often have only a week or less to review a draft permit and submit comments to the Department. We assume other members of the public must also experience a time crunch when reviewing draft permits.

40 CFR 51.161(b)(2) indicates that opportunity for public comment shall include, as a minimum, "a 30-day period for submittal of public comments." We have contemplated issuing a SIP Call to the State to require the public comment period on permits be extended to 30 days. We believe the State should revise its rules now to lengthen the public comment period to 30 days.

Response: 40 CFR 51.161(c) states that: "Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements." The 15-day comment period in the proposed rule is the same as in the existing rule, which has been submitted to and approved by the EPA. This 15-day period reflects the requirement in 75-2-211(9)(b), MCA, that the department make a final decision on a permit application within 60 days after receipt of an application, unless an

environmental impact statement is required. The department and the board will address a SIP call if one occurs.

Comment No. 16: In general, it is not clear how New Rules I through XVII integrate with the other applicable permitting requirements in subchapters 8 (Prevention of Significant Deterioration of Air Quality), 9 (Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Nonattainment Areas) and 10 (Preconstruction Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Attainment or Unclassified Areas). It is our understanding that the requirements in New Rules I through XVII would apply to all sources needing a permit, in addition to any applicable requirements in subchapters 8, 9, and 10, however that is not explicitly clear. It appears that the provision in the existing ARM 17.8.704(1), which explains the intent of subchapter 7, is not reflected anywhere in the new rules. We believe the new rules should make it explicit that the requirements in subchapters 8, 9, and 10 for major sources apply in addition to the requirements in New Rules I through XVII.

Response: The board believes that it is explicit that all applicable requirements of subchapters 8, 9 and 10 apply to all sources for which a permit is required under the proposed new rules. The board concurs with the position of Montana's Secretary of State that purpose or intent language that is not intended to be substantive should not be included in the text of administrative rules.

Comment No. 17: Currently, other subchapters in ARM Title 17, refer to the existing codification of subchapter 7. These other subchapters will need to be revised to reference the new codification of subchapter 7.

Response: The board agrees. However, because those subchapters were not included in the notice of proposed rulemaking, amending them now would be outside the scope of the permissible amendments in this proceeding. The board will propose to update these references soon in a subsequent rulemaking.

Comment No. 18: New Rule I(1) - definition of "best available control technology (BACT)": For consistency and clarity, we believe the term "emitting unit or modification" should be replaced with the term "new or modified emitting unit," as defined in New Rule I(11).

Response: The term "new or modified emitting unit" does not accurately describe the sources to which BACT will be applied under this subchapter. It would exclude older units that were constructed prior to March 16, 1979. The board wants to be consistent with the federal definition of permitting requirements for major stationary sources or major modifications and believes the proposed definition of BACT is clear and consistent.

Comment No. 19: New Rule I(2) - definition of "construct" or "construction": Including a "reasonable period of time for startup and shakedown" is not consistent with the definition of "construction" in ARM 17.8.801(10), ARM 17.8.901(6) and 40 CFR 51.166(b)(8). Since the definitions in this subchapter apply to all sources, including those subject to the permitting requirements in subchapters 8 and 9, we believe the definitions in this rule should be consistent with the definition in subchapters 8 and 9 and should not include startup and shakedown.

Response: Sources subject to the permitting requirements in subchapters 8 and 9 must meet the requirements of those subchapters, including the definitions of "construct" and "construction." Therefore, the board does not believe the definitions are inconsistent.

Comment No. 20: New Rule I(4) - definition of "emitting unit": In order to cover both new and modified units, we believe the definition should include "any equipment that emits or has the potential to emit". EPA also believes the definition should specify "any regulated pollutant under the Clean Air Act" for clarity.

Response: The board agrees and has added language to New Rule I(4) as shown above

Comment No. 21: New Rule I(6) - definition of "facility": The phrase "that contributes or would contribute to air pollution" in this definition is vague. We believe the phrase "that emits or has the potential to emit any air pollutant subject to regulation under the Clean Air Act" is more clear and consistent with other defined terms in this subchapter.

Response: The term "potential to emit" is commonly associated with permitted facilities. However, the board believes that both definitions indicate that a facility has a potential impact on air quality. Therefore, the board has not made the suggested change.

Comment No. 22: New Rule III(1)(k) - This exemption is redundant since the definition of "modify" includes an exemption for routine maintenance, repair or replacement. We believe this exemption should be deleted.

Response: The board finds the exemption in New Rule III(1)(k) for routine maintenance repair, or replacement of equipment, to be appropriate and necessary for clarity.

Comment No. 23: New Rule VI(1) - We believe the last sentence should also reference conditions necessary to assure compliance with the Federal Clean Air Act.

Response: The board agrees and has added language to New Rule VI(1) as shown above.

Comment No. 24: We do not see where ARM 17.8.710(5) has been addressed in the new rules. We believe that this provision should be included in New Rule VI.

Response: The board does not believe that it is necessary to expressly address in the proposed rules a facility's acceptance of permit conditions that are not appealed to the board. Montana law provides the right to appeal the department’s decision on a permit application. Conditions are placed in permits by the department, and the facility accepts these conditions if it does not appeal the permit.

Comment No. 25: New Rule VII(1)(b) - A reference to ARM Title 17, chapter 8, subchapter 10 (Preconstruction Permit Requirements for Major Stationary Sources or Major Modifications Locating Within Attainment or Unclassified Areas), in addition to subchapter 9, should also be included in this provision.

Response: The board agrees and has added language to New Rule VII(1)(b) as shown above.

Comment No. 26: Like the existing codification (ARM 17.8.733), New Rule XIV only allows the permittee, and not the public nor EPA, the ability to challenge the permit amendments issued by the Department. We believe the rule should be revised to allow EPA and the public the ability to request a hearing before the Board.

Response: The board does not believe it is necessary to grant the EPA or the public appeal rights for administrative amendments that have no substantive effects on the permit or the environment. If EPA or the public believe they have been adversely affected by the department's action, they have

judicial remedies. The language in the proposed rule is the same as in the current, EPA-approved, rule.

Comment No. 27: New Rule XV(1)(c)(i) should also reference the Federal Clean Air Act.

Response: The board agrees and has added language to New Rule XV(1)(c)(i) as shown above.

Comment No. 28: New Rule XV(1)(d) should also reference ARM Title 17, chapter 8, subchapter 8.

Response: The board agrees and has added language to New Rule XV(1)(d) as shown above.

Comment No. 29: The State has historically not submitted some rule provisions as SIP revisions. We are assuming the State intends to keep the following provisions as State-only provisions and are therefore not providing comments on them: New Rule XVI(1)(g) (ARM 17.8.702(1)(f)), New Rule XVII (ARM 17.8.706(5)), and New Rule I(10).

Response: The board intends to keep these provisions as state-only provisions.

BOARD OF ENVIRONMENTAL REVIEW

By: _____
JOSEPH W. RUSSELL, M.P.H.
Chairman

Reviewed by:

_____
DAVID RUSOFF, Rule Reviewer

Certified to the Secretary of State, _____, 2002.